Nos. 98-405, 98-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF
THE UNITED STATES,

Appellant, and

GEORGE PRICE, ET AL.,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal from the
United States District Court for the District of Columbia

BRIEF OF GEORGE PRICE, *ET AL.*, OPPOSING MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

The Motion to Dismiss or Affirm ("Motion") presents this Court with two telling contradictions. In part I of the Motion, the Bossier Parish School Board ("School Board") urges the Court to decline review of the merits of the decision below on grounds that it is moot, because there has been a general election for the School Board since the decision below using the precleared election plan. The School Board fails to acknowledge that there are legal and practical uses that will be made of the plan. Moreover, the School Board fails to face the consequence of a declaration of mootness at this stage of the proceedings: reversing or vacating of the judgment below.

With respect to parts II and III of the Motion, the School Board argues in part III that the correct legal standard for review of whether an election plan was adopted with the "purpose" of denying or abridging the right to vote on account of race or color "relates exclusively to retrogressive intent" on minority voters. Motion at 19. Yet the School Board argues in part II of its Motion that the three-judge court applied a different standard: Whether the election plan was infected with "non-retrogressive, but nevertheless discriminatory, 'purpose.'" Motion at 15. The School Board thus is trying to shield from appellate review a judgment that it believes evaluated the evidence under the wrong legal standard.

The confusion in the School Board's arguments highlights the importance of this Court's consideration of the decision below on the merits in order to confirm that the purpose prong of Section 5 forbids the implementation of an election change adopted with a racially discriminatory intent whether or not it is retrogressive.

A. This Appeal Is Not Moot Because, If the Decision Below Is Left Undisturbed, the School Board's Redistricting Plan Will Be Used in Any Special Election and To Form the Baseline for Retrogression Analysis in Redistricting After the Year 2000.

The School Board argues that this appeal is moot because its 1992 redistricting plan will "never again be used for any purpose," Motion at 9, and thus no further judicial consideration of the plan is consistent with the "case or controversy" requirement of Article III. The School Board cannot assure this Court that the election plan will "never" be used again.

First, the plan precleared below remains in effect regardless of the passage of the 1998 general election. Although the next scheduled School Board election will not be held until 2002, Louisiana law provides that a special election will be held to fill any vacancy on the School Board which may arise prior to the next scheduled election. LA. R.S. 18:402 (E). On a 12-member school board, the likelihood of at least one vacancy arising due to death, resignation, or other reasons over the course of a four-year term is high. In the event of a special election, the plan precleared by the court below would be used by the School Board, since the terms of that plan are not limited to the 1998 election or to regularly scheduled elections. This case accordingly is different from *Watkins v. Mabus*, 502 U.S. 954 (1991) and *Hall v. Beals*, 396 U.S. 45 (1969), in which the election change at issue was no longer in effect and the election had taken place.

Second, whether the election plan remains valid has important legal consequences and is not "of purely academic interest." Motion at 11. When the School Board adopts a new election plan after the Year 2000 Census, as the School Board pledges to do, Motion at 2, the existing plan will be the benchmark against which a new plan is compared to

determine if it will have the "effect of [denying] or abridging the right to vote on account of race or color," as provided in Section 5. This Court has explained in this case that "[r]etrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." App. 35a. 1/ If the preclearance decision is reversed by this Court, a different plan will be used as the benchmark: a new plan, if such a plan is precleared, or the 1980s School Board election plan. This alone creates a significant live controversy.

Finally, this appeal is not moot because equitable relief may be appropriate if the plan precleared below ultimately is found not to satisfy Section 5. *See Clark v. Roemer*, 500 U.S. 646, 660 (1991) (explaining that a "District Court should adopt a remedy [for a violation of Section 5] that in all circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner"). If it is ultimately determined that the plan does not comply with Section 5, the Attorney General or the defendant-intervenors could seek relief such as voiding the election or an order for a special election under a proper plan. *See Clark*, 500 U.S. at 660; *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 182-83 (1985), *Berry v. Doles*, 438 U.S. 190, 192-93 (1978). To find this appeal moot, thereby allowing a discriminatory plan to remain in effect and depriving its victims of any remedy, would be to do precisely "what § 5 was designed to forbid: allow the burdens of litigation and delay to operate in favor of the perpetrators and against the victims of possibly racially discriminatory practices." *Berry*, 438 U.S. at 194 (Brennan, J., concurring).

The School Board should not be heard to complain that the case is moot, in an effort to protect the decision

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1/ "App." references are to the Appendix to the Jurisdictional Statement filed on behalf of Janet Reno in No. 98-405.

below, but to foreclose appellate review sought in this Court. "[W]hen a civil case becomes moot pending appellate adjudication, 'the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1058 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *see Watkins v. Mabus*, 502 U.S. 954 (1991); *Burke v. Barnes*, 479 U.S. 361 (1987). If the School Board were correct that it would never use the plan again and the case were moot, the judgment below should be vacated and the case remanded with instructions to dismiss. Because the plan will be used, however, this Court should reach the merits of whether the district court on remand from this Court applied the appropriate legal standard to the evidence.

B. The Record Below Does Not Include Election Results Under the Plan.

After accusing the appellants of "gross factual distortions," Motion at 2, the School Board fails to identify any basis for such invective. Instead, the School Board uses its Counterstatement to argue that two elections held under the School Board's redistricting plan prove that the plan is not infected with discriminatory purpose. 2/ The School Board

2/ The School Board also seems to contend that because new precincts would have been required to formulate a School Board election plan that respected minority voting strength, use of the Police Jury plan must be automatically precleared for the School Board. The School Board's heavy emphasis on the "precinct splitting" issue is curious, because the district court had before it extensive stipulations of the parties on the timing and methods allowed for the creation of precincts in Louisiana. The School Board's contention that timing made it "impossible" for the Police Jury to establish new precincts to accommodate a different School Board redistricting plan, Motion at 4, is not supported by the record and is raised for the first time in the Motion. *See* Appendix to the Jurisdictional Statement in Nos. 95-1455 and 95-1508 at 69a-73a.

seeks to have this Court take "judicial notice" of the results of two sets of school board elections: the 1994 and 1998 elections. *See* Motion at 8. This Court, however, already has rejected in this case an effort by the School Board to inject into the record election results that post-date the adoption of the plan.

In March of 1996, the School Board filed in the earlier proceeding in this Court, Numbers 95-1455 and 95-1508, a Motion to Supplement Record attempting to bring to the Court's attention election results from earlier that month. The Court denied the motion. *Reno v. Bossier Parish School Board*, 517 U.S. 1154 (1996). On remand from this Court's decision in Numbers 95-1455 and 95-1508, the district court asked "whether the record needs to be reopened and whether, on what issues, and on what schedule additional briefs should be filed." Order dated August 13, 1997 in CA No. 94-1495. The parties agreed that the record should not be opened, however, and the district court concluded "that there is no need to reopen the evidentiary record. . . ." Order dated Sept. 9, 1997 in CA No. 94-1495. 3/

The 1998 election results that the School Board argues are virtually dispositive never have been analyzed in any way or presented to the district court. The election took place on October 3, 1998, after the filing of the Jurisdictional Statements in this matter on September 4, 1998.

It would be unfair and highly irregular for the Court to take "judicial notice" on appeal of the results of elections held while these proceedings are still in progress. The judgment of the district court should be reviewed based on the evidence of record when the judgment was rendered. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S.

3/ *See* Memorandum of Defendant-Intervenors George Price, et al., Concerning Remand Issues, at 1-2 (Sept. 5, 1997).

481, 486 n.3 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970); *Russell v. Southard*, 53 U.S. 139 (1851); *Boone v. Chiles*, 35 U.S. (10 Pet.) 177, 208 (1836). That is the only way for an appellate court to review properly the election decisions of public officials; those officials did not have the later election results before them when they adopted the districting plan in question. *See Bush v. Vera*, 517 U.S. 952, 971 n.* (1996); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir. 1998). This is particularly true where, as here, the pending litigation itself may have had an impact on the election. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 76 (1986); *Clark v. Calhoun County.*, 21 F.3d 92, 96 (5th Cir. 1994).

The School Board's contention that "appellate courts have routinely taken judicial notice of post-trial elections in voting rights cases," Motion at 7 n. 4, is not even supported by the cases cited. *Southern Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1288 n.13 (11th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996) and *Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1045 (5th Cir. 1990) do not allow judicial notice by appellate tribunals of post-trial election results. In *Southern Christian Leadership Conference*, the Eleventh Circuit, in the course of reviewing a district court decision upholding Alabama's at-large election of trial judges, took judicial notice that one black judge had retired since the district court decision. *Southern Christian Leadership Conference*, 56 F.3d at 1287-88. The judge's retirement did not speak to the district court's analysis of electoral systems, did not impact the appellate court's review, and had nothing to do with a post-trial election. *Id.* at 1287-88. In *Westwego Citizens*, the Fifth Circuit did not take judicial notice of anything. There, the court reviewed a district court decision dismissing a challenge to Westwego's at-large election of aldermen. *Westwego Citizens*, 906 F.2d at 1042-43. The

Fifth Circuit remanded the case to the district court twice, *id.* at 1042-44, and held that the *district court* erred in failing to consider evidence of a subsequent election on the first remand. *Id.* at 1042. The court remanded the case again, and ordered the *district court* to hear evidence of subsequent elections. *Id.*

The School Board has not even sought leave to bring the election results into this record. Leave would be inappropriate in any event. As the Court has done before in this case and others, it should disregard election results after the redistricting decision at issue because they have no relevance to the School Board's "purpose" under Section 5 when it adopted the districting plan.

C. The District Court Failed To Assess the Evidence Under the Legal Standard for Weighing Discriminatory Intent Set Forth by This Court in *Arlington Heights*; Its More Restrictive Standard of Retrogressive Intent Is Not Appropriate Under Section 5.

The district court identified the legal standard it used to evaluate whether the School Board had demonstrated the lack of "purpose" to deny or abridge the right to vote on account of race or color in its districting plan: "The question we will answer. . . is whether the record disproves Bossier Parish's retrogressive intent in adopting the Jury plan." App. 4a. The School Board tries mightily to cast the district court's analysis of discriminatory intent as the type delineated by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Motion at 14 - 19. That possibility is contradicted by the district court's own repeated references to "retrogressive intent" as the measure for evaluating specific categories of evidence. Those references were reviewed at pages 16 - 17 of our Jurisdictional Statement, so will not be repeated here.

There is something very new about the School Board's argument in its Motion: For the first time, after extensive evidentiary proceedings in the district court, review by this Court, and remand proceedings before the district court, it argues that "retrogressive intent" is the proper standard for evaluating whether the districting plan is infected with a "purpose" to deny or abridge the right to vote on account of race within the meaning of Section 5.

The principal Supreme Court cases cited in part III of the School Board's Motion undercut its argument that "intent to retrogress" is the only form of intent outlawed by Section 5. The School Board bases much of its argument on the original case holding that retrogression is the only effect covered by Section 5. *Beer v. United States*, 425 U.S. 130, 141 (1976). The *Beer* Court acknowledged, however, that retrogressive effects are not the only denial or abridgment of the right to vote on account of race or color that Section 5 addresses:

> We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so *discriminates on the basis of race or color as to violate the Constitution.*

Beer, 425 U.S. at 141 (emphasis added). Of course, one way to discriminate on the basis of race is to act with a discriminatory intent:

> An official action, whether an annexation or otherwise, taken for the *purpose of discriminating* against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.

City of Richmond v. United States, 422 U.S. 358, 378-79 (1975) (emphasis added). Richmond's purpose, as found by the lower court, was "perpetuating white majority power to exclude Negroes from office through at-large elections." 422

U.S. at 373. *See also Hunter v. Underwood,* 471 U.S. 222 (1985).

In *Pleasant Grove v. United States*, 479 U.S. 462 (1987), the Court said that the City's purpose was *"perpetuat[ing]* Pleasant Grove as an enlarged enclave of white voters." 479 U.S. at 470 (emphasis added). Since the City had only two black voters out of a total population of 7,000, the black voting strength at the time of the decision was effectively zero. Given that state of affairs it is hard to see how the School Board can argue that Pleasant Grove was proposing to retrogress from its then-current status of blacks lacking any voting power. This Court explained that "[t]he failure to annex black areas while simultaneously annexing nonblack areas is highly significant in demonstrating that the [City's] annexations were purposefully designed to perpetuate [Pleasant Grove] as an enlarged enclave of white voters." *Id.* A purpose to stop or counteract the growth in black voting strength is not a retrogressive purpose but an intent to maintain the status quo — a status quo in which whites hold the power.

The novelty of the School Board's argument is underscored by its earlier, consistent position that retrogressive intent was not the only "purpose" covered by Section 5. This Court confirmed the agreement of the parties on that issue at oral argument in 1996:

> QUESTION: Well, what is your position here? Is it your position here that the only purpose that is relevant under Section 5 is purpose to cause retrogression, as distinct from purpose to discriminate by effecting a purposeful dilution?
>
> MR. CARVIN: Oh, no. No, not at all. I think that decision, the Court's decision in Richmond and Pleasant Grove has already decided that issue and, indeed, since it was stipulated that it didn't even have the effect of retrogression, you can obviously

assume they didn't have the purpose to retrogress, and this would have been a one-paragraph opinion.

QUESTION: But there could have been a purpose to dilute.

MR. CARVIN: Yes. That's the whole point.

Reno v. Bossier Parish Sch. Bd., Transcript of Oral Argument, Dec. 9, 1996, 1996 WL 718469 at *30-*31. The Price appellants agree with the position taken by the School Board in 1996.

CONCLUSION

For all of these reasons, and those described in the Jurisdictional Statements, we submit that the Court should note probable jurisdiction.

Respectfully submitted,

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